34701-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LEONARD F. DAVISON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. In support of the order denying defendant's motion to suppress evidence found in a pouch in the car, the court erred in finding:[1]

> 2. That Deputy Dawson and Deputy Bohanek, after initiating the stop, had reasonable basis to treat the stop as a Terry stop and investigate further.

(CP 124)

2. The court erred in finding:

> 3. That the status of the damaged ignition established significant differences from Penfield that would have lead a reasonable person, under similar circumstances to believe the vehicle in question may have been stolen, therefore the continued questioning of the driver and passengers was not unlawful.

(CP 124)

3. The court erred in denying the motion to suppress evidence found in the course of arresting Mr. Davison. (CP 124)

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[1] Findings of fact erroneously denoted as conclusions of law are reviewed as findings of fact. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

4. In support of the judgment convicting Mr. Davison of unlawful possession of methamphetamine and a dangerous weapon, the court erred in finding:

> 12. Also contained in the zippered case was a spring operated knife, known commonly as a switch blade.

(CP 137)

5. The court erred in concluding:

> 2. Mr. Davison was in possession of methamphetamine, in Spokane County, State of Washington, on January 3, 2016 by sitting on or in front of the item and being the last person out of the vehicle.

(CP 137)

6. The court erred in concluding:

> 3. Mr. Davison was in possession of a spring blade knife, and defined in RCW 9.41.250 by sitting on or in front of the item and being the last person out of the vehicle.

(CP 137)

7. The court erred in determining Mr. Davison was guilty of possession of a dangerous weapon.

8. The court erred in determining Mr. Davison was guilty of possession of methamphetamine.

B. ISSUES

1. Once an officer's reasonable suspicion has been dispelled, do law enforcement officers violate the right to be free of unreasonable seizures by continuing to detain the vehicle and its passengers?

2. Once the reason for a traffic stop has been dispelled, is the continued detention of the vehicle and its passengers unlawful?

3. Is continued questioning of the driver and passengers constitutionally permissible based on observations made after the reasonable suspicion justifying the initial detention has been dispelled?

4. Does the court err in denying a motion to suppress evidence obtained in the course of an investigation initiated after initial seizure of a vehicle and its passengers has exceeded the permissible scope of a traffic stop?

5. Is evidence an individual may have been sitting on a small soft pouch later found to contain methamphetamine, coupled with evidence the defendant had been previously tested positive for drug use at an unspecified time in the

past, sufficient to support finding the individual possessed the methamphetamine?

6. Is evidence an individual may have been sitting on a small soft pouch later found to contain a spring operated knife, coupled with evidence the defendant had been tested positive for drug use at an unspecified time in the past, sufficient to support finding the individual possessed the knife?

C. FACTUAL BACKGROUND

Leonard Davison is a 60-year-old Native American member of the Coeur d'Alene tribe. (CP 31, RP 185) He is 5 feet 9 inches tall and weighs 315 pounds. (CP 31, RP 187) On the evening of January 2 he was visiting Spokane and missed the last bus back to the reservation. (RP 186) His niece and a friend were using her boyfriend's car and they offered him a ride. (RP 187; CP 15)

Shortly after midnight, Deputy Amber Dawson saw a black Honda, ran the license number and determined the owner of the car was Kyle Phillips. (CP 31, 33) She ran a DOL check which showed he "was a DWLS3" so she initiated a traffic stop. (CP 33) She told the driver the reason for the stop and asked him to provide identification. (CP 33) He

gave her his Tribal Identification card and identified himself as Donny Carson. (CP 33)

Deputy Dawson then asked Mr. Carson if he had a license. (CP 33) He answered that he did not and explained that his license was suspended. (CP 33) Further investigation confirmed that he, too, "was DWLS 3rd degree" and furthermore had a misdemeanor warrant for driving while under the influence of intoxicants. (CP 33) Deputy Dawson arrested Mr. Carson. (CP 34)

"In an attempt to find a licensed driver for the vehicle" she asked the passengers for identification. (CP 34) The female passenger identified herself as Corrina Hendrycks. (CP 34) The passenger in the front seat was identified as Leonard Davison. (CP 34) A records check disclosed both passengers were the subjects of warrants. (CP 34) Both passengers were arrested. (CP 34)

Deputy N. Bohanek assisted Deputy Dawson on the traffic stop. (CP 29) Deputy Bohanek had previously encountered the registered owner of the car, Kyle Phillips, but in the present case he had been unable to see the driver prior to the traffic stop. (CP 37)

Deputy McQuitty was fortuitously driving behind Deputies Dawson and Bohanek at the time and stopped to assist in the investigation. (CP 37) While Deputy Dawson was contacting Mr. Carson, Deputy

Bohanek was standing behind Deputy McQuitty near the passenger side of the Honda. (CP 37) From this vantage point Deputy Bohanek could see that the Honda's ignition had been punched (CP 37) Suspecting the car might be stolen, he obtained the driver's name from Deputy Dawson, and verified the driver's identity by checking the in-car booking photo database. (CP 37-38)

As Deputy McQuitty placed Mr. Davison under arrest, and Mr. "Davison got out of the vehicle Deputy Bohanek observed a small zippered case and digital camera on the front passenger seat under Davison." (Exh. P-2; CP 38, 136)

A subsequent examination of the zippered bag disclosed two knives and an open cigarette pack[2] that contained cigarettes and a plastic baggie; the baggie was later determined to contain a small quantity of methamphetamine. (CP 39, RP 38-39, Exh. P-4)[3]

The State charged Mr. Davison with possession of a controlled substance and a dangerous weapon. (CP 1) Appointed counsel moved to suppress evidence obtained incident to an allegedly unlawful search and seizure, citing *Penfield* and arguing that once Deputy Dawson learned the driver was Mr. Carson, not Mr. Philips, the deputy should have told Mr.

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[2] The cigarette package was not introduced into evidence. (RP 41)

[3] The record contains no evidence to support the court's finding that one of these knives is commonly known as a switchblade.

Carson the reason for the stop and told him he was free to go. (CP 13) The court denied the suppression motion, finding evidence supported a reasonable suspicion the car was stolen. (CP 123-24)

Deputy Bohanek, testifying at trial, told the court that he had participated in the events leading up to the discovery of the zippered bag on the passenger seat. (RP 23-30) The deputy stated that as Mr. Davison was getting out of the Honda, "I saw that he had been sitting on a couple of items." (RP 31) The deputy did not ask Mr. Davison if the items belonged to him and Mr. Davison never acknowledged ownership of them. (RP 67) The deputy had no idea whether Mr. Davison had ever held or opened the zipped bag. (RP 67)

The deputy recalled removing an unspecified quantity of clothing from the passenger compartment at Mr. Carson's request. (RP 66)

Deputy Dawson testified that, as she assisted in taking Mr. Davison into custody, Deputy Bohanek gave her the zippered pouch and camera, stating that "he was sitting on them; must be his items." (RP 114-15) Mr. Davison stated that they were not his. (RP 115) She stated that there was a spring-loaded knife in the zippered bag when she placed it in property, and she identified a knife, Exhibit P-7 as the spring-loaded knife she had recovered at the jail. (RP 88, 94)

According to Deputy Dawson, she inventoried the Honda before it was towed from the scene and found clothing, paperwork, a briefcase, and some travel bags. (RP 120-23)

D. ARGUMENT

1. THE EVIDENCE FOUND IN THE SEARCH OF THE HONDA SHOULD HAVE BEEN EXCLUDED AS THE FRUIT OF AN UNLAWFUL SEIZURE.

Washington's Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. A vehicle stop, "although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article 1, section 7 of the Washington Constitution." *State v. Creed*, 179 Wn. App. 534, 539–41, 319 P.3d 80 (2014) (quoting *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986)).

Under the exclusionary rule, "[i]f the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible as fruits of the poisonous tree." *Kennedy*,107 Wn.2d at 4.

"A Terry investigative stop only authorizes police officers to briefly detain a person for questioning without grounds for arrest if they reasonably suspect, based on 'specific, objective facts,' that the person

detained is engaged in criminal activity or a traffic violation." *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). To satisfy the reasonable suspicion standard, the officer's belief must be based on objective facts. *Creed*, 179 Wn. App. at 543 (citing Charles W. Johnson & Debra L. Stephens, *Survey of Washington Search and Seizure Law; 2013 Update*, 36 Seattle U. L. Rev. 1581, 1681 (2013)). The State carries the burden of showing that a particular search or seizure falls within one of the exceptions to the warrant requirement. *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (citing *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

An investigative stop under RCW 46.20.349 is constitutional because the law enforcement officer has an articulable suspicion of criminal conduct—i.e., that the driver is the registered owner who has a suspended license. *State v. Penfield*, 106 Wn. App. 157, 160–61, 22 P.3d 293 (2001). In *Penfield* the court held that an officer may not, without additional grounds for suspicion, proceed with a stop based on a registration check once it is manifestly clear that the driver of the vehicle is not the registered owner. *Penfield*, 106 Wn. App. at 162.

In *State v. Creed*, after initiating a traffic stop, the officer discovered that he had mistakenly misread the car's license plate number. The court held it was reasonable for the officer to approach the driver,

explain his actions, and tell her she was free to go once he realized his mistake. In that case, however, the court held that once the officer's suspicions were dispelled, his observation of suspicious evidence in the back seat of her car could not provide an independent basis for detaining her and the suspicious evidence was inadmissible. *Creed*, 179 Wn. App. at 543.

Here, the court properly concluded "[t]hat the initial traffic stop made by Deputy Dawson and Deputy Bohanek was within the scope of authority of law enforcement to determine if the driver of the vehicle was the registered owner, Kyle Phillips, was DWLS 3rd." (CP 123) Nevertheless, because the driver promptly displayed identification showing he was not the suspected driver, Deputy Dawson exceeded the permissible scope of the seizure in questioning him about his driver's license. See *Penfield*, 106 Wn. App. at 162.

Deputy Dawson's only articulable suspicion of criminal activity was information that the driver's license of the vehicle's owner was suspended. She had no reason to ask Mr. Carson for his driver's license after he provided identification showing he was not Kyle Phillips, the registered owner. But, rather than acknowledge that she had no basis for further detaining him, she went on to ask for his license

The record provides no basis for further detaining the Honda or its occupants based on observations supporting in inference the car might be stolen. The State presented no evidence that the deputies observed this evidence before Mr. Carson displayed his identification, thereby dispelling the suspicion that justified the stop. The court nevertheless predicated its ruling on an assumption that the deputies could continue to detain the driver and passengers.

Deputy Bohanek did not specify the point in time when he observed the damaged ignition. The court found:

> 2. That Deputy Dawson and Deputy Bohanek, after initiating the stop, had reasonable basis to treat the stop as a Terry stop and investigate further.
> 3. Deputy N. Bohanek observed that the vehicle's steering column had been damaged and the vehicle was operating without a key. Deputy Bohanek informed Deputy Dawson of his observations and suspicion the vehicle might be stolen.
> 4. The defendant, a passenger in the vehicle, was asked for identification pursuant to the deputies' articulable suspicion that he may be riding in a stolen vehicle.

(CP 124) The court made no finding regarding the sequence of these events. The court did not find Mr. Carson's identification was insufficient to dispel the deputies' suspicion. The court did not find Deputy Bohanek observed suspicious evidence of car theft prior to the time Deputy

Dawson's suspicions were dispelled. Thus neither the record nor the court's findings supports a conclusion that a reasonable suspicion of car theft arose in the course of a lawful seizure of the vehicle. The State failed to carry its burden of showing that the search or seizure fell within an exception to the warrant requirement. *Duncan*, 146 Wn.2d at 172. The court's findings in this respect are not supported by the record. They do not support the court's assertion "[t]hat Deputy Dawson and Deputy Bohanek, after initiating the stop, had a reasonable basis to treat the stop as a *Terry* stop and investigate further." The court's findings do not support the court's ruling denying the motion to suppress. (CP 124)

Once the initial reasonable suspicion had been dispelled, observations of suspicious evidence could not provide an independent basis for detaining the car or its occupants. *Creed*, 179 Wn. App. at 543. Evidence derived from the continued detention was inadmissible. *Id.*

2. THE EVIDENCE OF POSSESSION OF THE POUCH WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

An appellant challenging the sufficiency of the evidence to support his conviction must show whether a rational factfinder, viewing the evidence in a light most favorable to the State, could find the elements of the offense beyond a reasonable doubt:

> We review the evidence in a light most favorable to the State to determine "whether ... any rational trier of fact could have found guilt beyond a reasonable doubt" where a criminal defendant challenges the sufficiency of the evidence. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992); *see also State v. DeVries*, 149 Wash.2d 842, 849, 72 P.3d 748 (2003); *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980).

State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

"RCW 69.50.4013(1) provides, 'It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.'" *State v. Higgs*, 177 Wn. App. 414, 436, 311 P.3d 1266 (2013).

Actual possession requires the item to be in the physical custody of the person charged. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession occurs when the person has dominion and control over the item enabling that person to immediately convert the

item to actual possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

"[M]ere proximity is insufficient to show dominion and control. Temporary residence, personal possessions on the premises, or knowledge of the presence of the drug, without more, are also insufficient." *State v. Dobyns*, 55 Wn. App. 609, 614–15, 779 P.2d 746 (1989). Knowledge of the presence of a drug is, by itself, insufficient to prove dominion and control. *State v. George*, 146 Wn. App. 906, 923, 193 P.3d 693 (2008) (citing *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d 263 (1997)).

Mere proximity to the contraband is insufficient to show constructive possession. *State v. Spruell*, 57 Wn. App. 383, 388–89, 788 P.2d 21 (1990); *State v. McCaughey*, 14 Wn. App. 326, 329, 541 P.2d 998 (1975). "[T]hat proximity *coupled with the other circumstances* linking [the accused to the controlled substance is] sufficient to create an issue of fact on constructive possession." *State v. Mathews*, 4 Wn. App. 653, 656–58, 484 P.2d 942 (1971) (emphasis added).

The trial court found "Deputy Bohanek recovered a 6"x4"x3" brown zippered case and small red digital camera on the seat where Mr. Davison had been sitting. The camera was not owned by Mr. Davison. The deputy testified that Mr. Davison would have been sitting directly on top of the case." (CP 136, Finding 10) The court found that Mr. Davison had

admitted to methamphetamine use on a prior occasion. (CP 137, Finding 15) The court did not identify any other circumstances, apart from the location of the zippered case, that could link Mr. Davison to the controlled substance. The trial court's findings are insufficient to support Mr. Davison's conviction.[4]

Appellant has found only one case in which a court addressed the sufficiency of evidence the defendant was sitting on the contraband to support a finding of possession:

> Here the only substantial evidence linking defendant to the offense charged was the discovery of two pills on the bucket seat he occupied when he was ordered by the police to get out of the Keefe vehicle. He was neither the owner nor the operator of that vehicle and it was not in his control. There was no testimony that he knew that he had been sitting on two dexamyl pills, or that he had ever controlled or exercised any degree of possession, either contructive or actual, over them. Neither was there any testimony that he had any drugs in his possession or that he knew the pills were barbiturates.
>
> In the light of that limited factual background, can it be said that it was any less reasonable or rational to infer that the

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[4] The trial court adopted the findings entered by another judge following the first suppression hearing. "The Court expressly adopts and incorporates herein by this reference the Findings of Fact entered by the Honorable Judge Sam Cozza on July 25, 2016, and filed July 26, 2016." (CP 136, Finding 1) The evidence relied on by the judge at the suppression hearing consisted of police reports and affidavits. This hearsay evidence would not have been admissible at trial. Accordingly, the findings should only be considered to the extent that they are supported by testimony presented to the trial court.

In Detective Bohanek's opinion, "[t]here was no possible way that Davison could have been sitting on the case without knowing it was beneath him" and inferred that the bag must have belonged to Mr. Davison. (CP 38-39)

> pills were in the vehicle either without defendant's knowledge or before he became a passenger than it was to infer that he either intentionally controlled or consciously possessed them? We think not. That being so, it becomes obvious that the circumstantial evidence essential to a conviction in this case was not incompatible with a reasonable hypothesis of innocence, and that it failed to exclude every reasonable hypothesis but that of guilt. The trial justice was, therefore, clearly wrong when he found that all of the facts and circumstances necessary to the proof of the crime charged had been established beyond a reasonable doubt.

State v. Fortes, 293 A.2d 506, 508–09, 110 R.I. 406 (1972).

Here, as in *Fortes*, the trial court was clearly wrong when it concluded that "Mr. Davison was in possession of methamphetamine, in Spokane County, State of Washington, on January 3, 2016 by sitting on or in front of the item and being the last person out of the vehicle." (CP 137)

3. THE STATE SHOULD NOT BE AWARDED ITS COSTS FOR THIS APPEAL.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). An offender's inability to pay is an important consideration to take into account in deciding whether to disallow costs. *Sinclair*, 192 Wn. App. at 389.

Mr. Davison's affidavit is attached to this brief and states he is indigent and unable to pay the costs of the appeal. (CP 208-210) There is no trial court record showing his financial condition has improved. RAP 15.2(f) requires a party who has been granted such an order of indigency to notify the trial court of any significant improvement in financial condition. *Sinclair*, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. *Id.*; RAP 15.2(f).

Mr. Davison is 61 years old, has no assets and at present owes trial court costs in excess of $180,000. Due to these circumstances, "[t]here is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." *Sinclair*, 192 Wn. App. at 393.

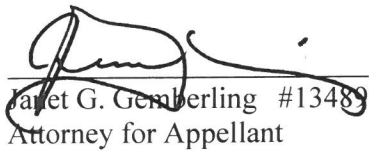
Imposing appellate costs on Mr. Davison would significantly reduce any possibility of his re-entering society successfully. *Id.* at 391; see also *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

E. CONCLUSION

The contents of the zippered pouch, evidence essential to the State's case, were erroneously admitted at trial. The convictions should be dismissed. Assuming, arguendo, that such evidence could be admissible, the evidence is insufficient to support the convictions and they must be dismissed.

Dated this 15th day of June, 2017.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 34701-0-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
LEONARD F. DAVISON,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on June 15, 2017, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Brian O'Brien
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I certify under penalty of perjury under the laws of the State of Washington that on June 15, 2017, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 15, 2017.

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